Supreme Court, U.S.
FILED

06-453 JUN 15 2006

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IN THE

SUPREME COURT OF THE UNITED STATES

JUNE 14, 2006

No.

JUAN A. GIRALDO
Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT FOR THE FIRST CIRCUIT

PETITIONER APPENDIX

Prepared by:

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Appeal No. 05-2192

UNITED STATES OF AMERICA
Appellee

V.

JUAN GIRALDO
Defendant– Appellant

GOVERNMENT'S MOTION FOR SUMMARY DISPOSITION

Pursuant to First Circuit Local Rule 27[c], the government respectfully requests that the Court summarily affirm the judgment of the district court on the ground that no substantial issue is presented by this appeal.

This is Juan Giraldo's appeal pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291 from a sentence imposed upon him by the Honorable William E. Smith on July 29, 2005. Giraldo pleaded guilty to a two-count indictment charging him with conspiracy to distribute and to possess with intent to distribute

500 grams or more of cocaine, 21 U.S.C. § 846 (Count One), and possession with intent to distribute 500 grams or more of cocaine, 18 U.S.C. § 841(a) (1) (Count Two); he was sentenced to concurrent terms of 71 months' imprisonment to be followed by 60 months supervised release, a $10,00 fine, and a $200 special assessment. The judgment was entered on the docket on August 4, 2005, and a notice of appeal was timely filed the same day. (An amended judgment adding a recommendation that Giraldo be designated to FMC– Devens was entered on august 19, 2005.)

In this appeal Giraldo claims that the district court (Smith, J) erred by increasing his total offense level by two levels of pursuant to USSG §3B1.1 [c] for being a leader, organizer, manager, or supervisor of criminal activity involving fewer than five participants. This Court should summarily affirm the judgment below because Giraldo's appeal raises no substantial issue.

REVELANT FACTS

The facts of the underlying case can be gleaned from paragraph 14 of the Pre-sentence Report ("PSR"). See United States v. Castellone, 985 F.2d 21 (1st Cir. 1993) ("Because [defendant] pled Pre-sentence Report (PSR) and the transcript of the sentencing hearing." Giraldo made no objections to this portion of the PSR, and the district court expressly relied on it in making its role determination. [App. at 21-22]. (To the extent of Giraldo's "Statement of Facts" asserts contrary facts concerning the origins and conduct of the cocaine transaction, see App. Br. At ix-xi, this court should disregard them, because those contrary facts do not appear in the record.)

On March 4, 2004, a cooperating witness ("CW") has a consensually-recorded conversation with Giraldo in which the CW asked Giraldo about the price of a kilogram of cocaine. Giraldo told the

CW that the price was $23,000. The CW offered to introduce Giraldo to the CW's own cocaine customer so they could conduct business directly, but Giraldo refused, stating that he thought it was too dangerous.

On March 7th 2004, the CW spoke to Giraldo again and told him that his (the CW's) customer wanted two kilograms of cocaine and could pay $30,000 that day and the rest the following day. Giraldo replied I can get them for you, but it's a great risk." Giraldo explained, "one of my guys, a few days ago got caught around here with 15 kilos." Giraldo then made some additional comments about how no one could be trusted. Giraldo told the CW that he told his own supplier $23,000 per kilogram, and the CW indicated that he quoted a price of $24,000 to his customer. Giraldo said "Yeah, you'll make $2,000," meaning a $2,000 profit from the sale of two kilograms.

On March 13, 2004, Giraldo met the CW at

the home of Giraldo's sister, Clara Vasquez, and told the CW that he (Giraldo) was going to New York to arrange a shipment of cocaine and would return later that night. Giraldo promised to sell the CW one kilogram of cocaine upon his return.

The following afternoon (March 14,2005), Giraldo had his cousin, Louis Giraldo, drop off a kilogram of cocaine at Vasquez's house while the CW was not there. Vasquez later told the CW what had occurred in his absence: Louis Giraldo arrived with the cocaine, told Vasquez the cocaine was in the car, and Vasquez instructed him ton bring it inside. When the CW has returned to the house, Vasquez gave him the cocaine, and the CW then left the house again, purportedly to deliver the cocaine to deliver the cocaine to his customer. (In fact, the CW delivered the cocaine to waiting DEA agents.)

While the CW was pretended to deliver the cocaine, he spoke to Vasquez on the phone and told

her that she would have to wait for him to return because "I have to count the money." A few minutes later, the CW called Giraldo on Giraldo's regular cell phone and said "Listen to me... I already, already went to the guy to do that errant with him, indicating that the CW had delivered the cocaine to his customer. Before the CW could say anything further, Giraldo yelled at him, "Listen, Listen! Why are you calling this telephone, fucker! [i.e. referring to his prepaid cell phone, which could not easily be traced to him]. Don't start that fuckin shit! You know you're not supposed to call me on his phone!"

A few minutes later, the CW called Vasquez back and told her that he was waiting for his customer's girlfriend to bring the rest of the money for the drugs and that he had just made a call to Giraldo's cell phone in an effort to tell Giraldo the same thing. Vasquez replied, "Oh! The very first thing I told you was.... Not to call him...! Why didn't

you call me? [I told you] not to call him . . . !

Law enforcement agents provided the CW with the money to pay for the cocaine and establishment surveillance of Vasquez's residense so that they could observe him deliver it. Approximately ten minutes after they did so, Giraldo's cousin, Carlos Giraldo then drove up behind another pair of surveillance agents who were in a maroon Mercedes and appeared to take down their license plate number. The CW, meanwhile, entered Vasquez's residence and later reported that he had given her the money for the cocaine. The CW also later reported that he was present that evening when Juan Giraldo arrived at the residence, went into the bedroom with Vasquez, and then told the CW that the money was "good", meaning the full amount was there.

On March 16,2004, the CW reported that he had spoken to Giraldo the previous day (i.e. the day after the sale) and that Giraldo had said that he was

worried about the Mercedes that had been outside Vasquez's residence at the time of the sale. Giraldo told the CW that he had checked the license plate of the Mercedes with a "friend" and had been told that the car was an FBI car. (The government currently has no evidence that Giraldo told the CW not to worry because he knew the "feds" were investigating him and that it had nothing to do with the CW. Giraldo then said that if the CW wanted any more drugs, he should contact Giraldo in person rather than on the phone.

During the next eight to ten weeks, the CW tried to negotiate the purchase of another kilogram of cocaine from Giraldo; Giraldo never declined, but kept putting the CW off. On June 7,2003, the CW had a consensually recorded conversation with Giraldo in which Giraldo explained that he did not want to sell the CW more drugs at that time because he was still worried about the police surveillance on March 14

involving the green Audi and maroon Mercedes. Giraldo said.

> Because, them people are smart...they know I am big and that I have very good connections. So they don't just want to get a Kilo, they want to find out where everything is and then get you really good..... Because that car (i.e. the maroon Mercedes), that car Belongs to DEA. That car,that red car that was there that day. And them people were there, it was for a reason. because after you came here, we were leaving and that other car was behind you and that car is form DEA also, it is a green Audi with tinted windows they were behind you... Because when you were coming up Branch Avenue, we were coming down. so I was even

going to drive back to get the money, and when I saw that Audi behind you, I said to myself, 'Fuck no.'

B. The Sentencing Proceeding

The PSR assigned Giraldo a base offense level of 26 based on the quantity and type of drugs involved in the charged crimes (i.e. 1,001 grams of cocaine). It then added two levels pursuant to USSG §3B1.1 [c] on the ground that Giraldo was a leader, organizer, manager, or supervisor of criminal activity involving fewer than five participants, and it subtracted three levels pursuant to USSG §3E1.1 for acceptance of responsibility, yielding a total offense level of 25. [PSR ¶¶ 16, 18, 31, 32]. Giraldo made a timely objection to the upward adjustment for role in the offense, which the Probation Officer rejected in her July 19, 2005 addendum to the PSR.

At the July 29, 2005, sentencing hearing, the

district court heard argument from both sides and ultimately agreed with the Probation Officer and the government that Giraldo should not receive a two-level upward role adjustment.

The court stated:

> I recognize the fact that Mr. Giraldo did not initiate this transaction, and perhaps did not go into it for his own personal profit but rather as a favor to someone close to him. Nevertheless, once he was persuaded to do it, he was the conductor of the crime. He made the decisions. He effectively set the price. He called the shots. He was the one that was directing the other participants in the transaction. He was clearly the most concerned about the counter-surveillance and made decisions with respect to how to respond to that surveillance.

[App. At 22].

ARGUMENT

I. The District Court's determination that

Giraldo was an Organizer, Leader, Manager or Supervisor Was Not Clearly Erroneous.

As this Court has repeatedly explained, "because role-in-offense determinations are inherently fact-specific, the district court's views demand considerable respect...and are reviewed on appeal only for clear error or mistake of the law." United States v. Talladino, 38 F. 3d 1255, 1261 (1st Cir. 1994) (quoting United States v. Ocasio, 914 F. 2d 330, 333 (1st Cir. 1990)); accord United States v. Mclean, 409 F 3d 492, 499 (1st Cir. 2005); United States v. Cruz, 120 F. 3d 1, 3 (1st Cir. 1997) (en banc).

Section 3B1.1 [c] of the Sentencing Guidelines provides for a two-level enhancement "(if) the defendant was an organizer, leader, manager, or supervisor in any criminal activity" that involved fewer than five participants. The commentary to

section 3B1.1 [c] states that, in making the role determination,

(f) actors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. USSG §3B1.1, comment. (n.4.)

Virtually every one of these factor supports the district court's finding that Giraldo wan an organizer, leader, manager, or supervisor of the crimes charged in the indictment. First, Giraldo exercised nearly exclusive decision making authority with respect to all aspects of the cocaine transaction. He is the one who obtained the kilogram of cocaine, determined the price at which he would sell it to the

CW, and dictated the time, place, and manner of delivery. He also engineered the counter-surveillance, followed up on it, and then made the decision that it was too dangerous to arrange a second sale despite the CW's repeated requests that he do so.

Specifically, even though the CW originally wanted to buy two kilograms of cocaine, Giraldo agreed to sell him only one, and Giraldo dictated the price the CW would have to pay ($23,000). Giraldo chose the date on which the sale would occur (March 14, 2005), the place where it would occur (Giraldo's sister's house), and the manner in which it would occur (Louis Giraldo delivered the kilo to Clara Vasquez at her house, and she gave it to the CW). Giraldo refused to meet the CW's own customer on the ground that it was too dangerous, and he refused to talk to the CW over the phone about the CW's efforts to collect payment. When the CW returned to Vasquez's house with the money, Giraldo's cousin,

Carlos Giraldo was performing counter-surveillance in Giraldo's Lexus, and Giraldo later determined correctly that the cars Carlos Giraldo had seen were undercover law enforcement vehicles. Giraldo then decided not to sell the CW additional kilos of cocaine because of this law enforcement scrutiny. In light of these facts, the district court had ample basis for its finding that Giraldo "was the conductor of the crime" who "called the shots" and "made the decisions." (App. 22).

Second, the nature of Giraldo's participation in the offense reflects his role as a leader/organizer. Giraldo performed the high-level functions of obtaining the drugs, setting their price, determining the time, date, and manner of delivery, and receiving the payment; he carefully avoid the low-level "dirty work" of actually handing the drugs over to the customer, collection the money from the customer, acting as a "lookout", or even talking to the customer

over the telephone, by using others to perform these tasks. See Cruz, 120 F. 3d at 3-4 (upholding upward role adjustment in part because defendant "involved various individuals not only as facilitators but also as go-betweens in an effort to limit his own apparent involvement," a "pattern [that] is familiar in many sophisticated but illegal transactions"). Giraldo's role in determining that the blue Audi and maroon Mercedes were in fact surveillance vehicles, and then making the strategic decision that it was too dangerous to attempt a second sale, only confirm his leadership role in the conspiracy.

Third, Giraldo's recruitment of accomplices, and the degree of control and authority he exercised over them, are characteristic of both a leader/organizer and a manager/supervisor. Giraldo used his cousin Luis Giraldo to drop off the cocaine at his sister Clara Vasquez's residence; he used Vasquez to deliver the drugs to the CW, collect the money, and

talk to the CW on the telephone; and he used his cousin Carlos Giraldo to conduct counter-surveillance outside his sister's residence on the day of the transaction. These facts provide ample grounds for the court's conclusion that Giraldo "was the one that was direction the other participants in the transaction." [App. at 22].

Fourth, Giraldo's degree of participation in planning or organizing the offense was high. As has already been noted, Giraldo determined when, where, and how the drug sale would occur; how much would be sold and at what price; who would participate and what roles they would play; and whether or not there would be future sales.

The facts of this care are at least as compelling as those in United States v. Berrios, 132 F 3d 834 (1st Cir. 1998), where this Court upheld an upward role adjustment merely because the defendant "was always the person contacted when heroin was to

be purchased," "always returned pager calls," "set prices and determined the location of the transactions," was sometimes accompanied by "subordinates," and hired someone to mind a "heroin store." Id. At 839.

In contrast, the cases on which Giraldo chiefly relies -- United States v. Castellone, 967 F 2d. 728 (1st Cir. 1993) — are nothing like this one. In Castellone , an undercover officer made two one-pound marijuana purchases from the defendant, met the defendant's supplier during the second purchase, and then began dealing directly with the defendant's supplier. Castellone, 985 F. 2d at 22. Over the objection of both the government and defense counsel, the district court found that the defendant was a manager/ supervisor. Id. at 26. This court reversed because the evidence failed to show that the defendant was anything more than an ordinary street level dealer, who did not organize or exercise control

over anyone. Id. at 26. Here, in contrast, the evidence showed Giraldo to be a sophisticated, high-level drug trafficker, who not only made all major decisions about a one-kilogram cocaine who not only made all major decisions about a one- kilogram cocaine transaction but also enlisted others to deliver the drugs, collect the money, communicate with the buyer, and conduct counter-surveillance. Furthermore, unlike the district court in Castellano, which essentially made no findings in connection with its role determination, the court below specifically found that Giraldo "made the decisions" and "called the shots", that he "direct(ed) the other participants in the transaction," and that he "was clearly the most concerned about the counter-surveillance and made decisions with how to respond to that surveillance." [App. At 22].

In Sostre, the Court held that it was an error to characterize the defendant as a manager/supervisor

because "(a) t no time was [the defendant] shown to have control over the cocaine.... he [was not] the principal with whom the government agent transacted the sale.... [a]t all times he had to make contact with his codefendants before making representations to the buyers..., and [t]here is nothing in the record to show that he exerted control over any of the other codefendants, with the possible exception of his brother, who served as a lookout." 967 F. 2d at 733. Here, in contrast, Giraldo *had control* over the cocaine, *he* was the principal with whom the government agent transacted the sale, he never told the CW he had to get back to him on anything but instead simply dictated the quantity and price of drugs he would sell and the time, place, and manner of the sale, and he enlisted at least three other people (i.e. Carlos Giraldo, Louis Giraldo, and Clara Vasquez) to deliver the drugs, collect the money, and perform countersurveillance.

Giraldo's argument that the CW, rather than Girlaldo, was the leader, organizer, manager or supervisor of the conspiracy is without merit. (Throughout Giraldo's brief, he refers to the CW as Vasquez's husband and/or his own brother-in-law.) The CW did not set the price at which he purchased the cocaine from Giraldo; he did not even bargain about it. He simply asked Giraldo the price and ace pted what he was told. Similarly, the CW asked Giraldo for two kilograms, but had to wait until March 14, 2005, to buy it, which is the date on which on which Giraldo decided to sell it to him. The CW did not know where, when or how the cocaine would be delivered to him until he actually received it; all those decisions were made by Giraldo. The CW had no control over the actions of Luis Giraldo, Carlos Giraldo, or Clara Vasquez, because all three were acting at Giraldo's direction. The CW did not instigate and direct the counter-surveillance or follow

up on it. Finally, if it was not perfectly clear who was calling the shots before March 14, 2005 sale, it was perfectly clear afterwards, because the CW repeatedly asked Giraldo to sell him more cocaine, but Giraldo refused on the grounds that it was too dangerous.

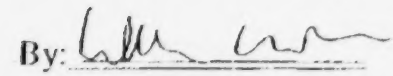
CONCLUSION

Because the district court's factual finding that Giraldo was a leader, organizer, manager and/or Supervisor of the conspiracy was not clearly erroneous, and because Giraldo's appeal raises no substantial issue, the government respectfully requests that the appeal be summarily denied. Should the Court find that it cannot dispose of this appeal on the government's motion for summary disposition, the government respectfully requests permission to file a responsive brief.

Respectfully submitted,

MICHAEL J. SULLIVAN

United States Attorney

By: 

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Certificate of Service

I, William Weinreb, AUSA, certify that I caused this motion to be served by first-class mail on the defendant's attorney, Victor J. Beretta, Jr., Esq., 381 Atwells Avenue, Providence, RI 02909 on March 9,2006.

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Assistant U.S. Attorney

APPENDIX "B"

United States Court of Appeals

For the First Circuit

No. 05-2192

UNITED STATES,

Appellee,

V.

JUAN GIRALDO,

Defendant, Appellant.

Before

Boudin, Chief Judge,

Torruella and Howard, Circuit Judges

JUDGMENT

Entered : March 17, 2006

The government's motion for summary disposition is granted. The district court's factual determination that defendant Juan Giraldo was an

organizer of leader of the criminal conspiracy and decision to impose a two-level enhancement to his total offense level pursuant to USSG §3B1.1 were not clearly erroneous. United States v. Talladino, 38 F. 3d 1255, 1261 (1st Cir. 1994)

Therefore, after careful review of the parties' filings and the record, the sentence imposed by the district court is summarily affirmed. See 1st Cir. R 27 [c].

By the Court:

Richard Cushing Donovan, Clerk

By: MARGARET CARTER

Chief Deputy Clerk

[cc; William D. Weinreb, AUSA, Dina Michael Chaitowitz, AUSA, Randy Olen, Esq., Victor J. Beretta, Esq.]